MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

CASE OF PATIENT SHOT IN SOUTHFIELD PSYCHIATRIST'S OFFICE TO BE ARGUED BEFORE MICHIGAN SUPREME COURT TOMORROW
Gunman had been in plaintiff's therapy group; psychiatrists' liability at issue

LANSING, MI, November 2, 2009 – A woman who was shot during her group therapy session by a former member of the group will have her appeal heard during oral arguments before the Michigan Supreme Court tomorrow.

At stake in *Dawe v Bar-Levav & Associates, P.C.*, is whether the estate of Southfield psychiatrist Dr. Reuvan Bar-Levav and his practice are liable for plaintiff Elizabeth Dawe's injuries. Dawe had attended group therapy sessions with Joseph Brooks, whom Bar-Levav discharged as a patient when Brooks stopped taking his medications. Several months later, Bar-Levav was leading a group therapy session that included Dawe when Brooks came into the office and fatally shot the psychiatrist. Brooks killed another patient, and shot Dawe and another, before turning the gun on himself. Dawe brought both statutory and common-law claims of medical malpractice against the defendants, contending that the defendants knew or had reason to know that Brooks presented a danger to other members of the therapy group, and that the defendants failed to take reasonable steps for Dawe's protection. A jury found in Dawe's favor and awarded over $646,000, but the Michigan Court of Appeals reversed in a 2-1 decision. Noting that Brooks never directly threatened Dawe, the appellate court majority said Dawe had failed to state a statutory "failure to warn" case. The dissenting judge said in part that the statute does not affect a mental health professional's duty to refrain from actively placing another person in danger.

The Court will also hear arguments in another medical malpractice case, *Holman v Rasak.* In *Holman*, the defendant doctor's attorney sought a court order allowing him to conduct an ex parte interview – an interview without plaintiff's counsel present – of another physician who had treated the deceased patient. Michigan law has held that, by filing a medical malpractice lawsuit, a plaintiff waives the statutory physician-patient privilege with respect to any injury, disease, or condition at issue in the lawsuit. Accordingly, Michigan courts have also permitted defendants' attorneys to meet ex parte with the injured party's treating physicians as part of discovery. But the plaintiff in *Holman* argues that the Health Insurance Portability and Accountability Act of 1996 prevents such ex parte meetings, and that the HIPAA regulation permitting disclosure of medical information pursuant to court order applies only to written records, not oral communications.

The Court of Appeals acknowledged in *Holman* that HIPAA does supersede Michigan law to the extent that the federal statute is more stringent, so without a plaintiff's written consent, a treating physician may only disclose medical information under conditions set out in the HIPAA regulations. But the appellate court said that, while HIPAA's regulation "does not specifically

address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure."

The remaining 12 cases that the Court will hear involve campaign finance, civil procedure, criminal, medical malpractice, tax, worker's compensation, and zoning law issues.

Court will be held on **November 3, 4 and 5** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court's oral arguments are open to the public.

Following oral arguments on the morning of November 5, the Court will hold a public administrative conference in the courtroom. The conference agenda is available at http://www.courts.michigan.gov/supremecourt/Resources/Administrative/AdminConf.htm.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, November 3
Morning Session

KYSER v KASSON TOWNSHIP (case no. 136680)
Attorney for plaintiff Edith Kyser: Christopher M. Bzdok/(231) 946-0044
Attorney for defendant Kasson Township: Gerald A. Fisher/(248) 514-9814
Attorney for amicus curiae Michigan Aggregates Association: John J. Bursch/(616) 752-2474
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
Attorney for amicus curiae American Planning Association and Michigan Association of Planning: Richard K. Norton/(734) 936-1097
Attorney for amicus curiae Michigan Paving & Materials Company and Edward C. Levy Company: Susan K. Friedlaender/(248) 851-3434
Attorney for amicus curiae Michigan Municipal League and Michigan Municipal League Liability& Property Pool: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Public Corporation Law Section of the State Bar of Michigan: Carol A. Rosati/(248) 489-4100
Trial Court: Leelanau County Circuit Court
At issue: The plaintiff's property adjoins the defendant township's gravel mining district and contains a large gravel deposit. Invoking the "no very serious consequences" rule of *Silva v Ada Township*, 416 Mich 153 (1982), the plaintiff obtained an injunction barring the township from enforcing an ordinance that prohibits gravel mining on her property. The township appealed, and the Court of Appeals affirmed in a published opinion. Was the "no very serious consequences" rule of *Silva* superseded by the enactment of MCL 125.297a? Does the *Silva* rule violate the separation of powers doctrine by providing enhanced judicial review of local zoning decisions?

Does the rule impermissibly shift the burden of proof onto the local government to defend its zoning policy?

Background: Edith Kyser owns a 115.6-acre parcel at the edge of the Kasson Township gravel district. Her property contains a large deposit of glacially-deposited outwash gravel, which is the most commercially valuable type of deposit. Her property adjoins an active gravel mine, and is located on a state trunk line highway, M-72, which already handles traffic from the township's numerous gravel mining operations. Kyser sought to have the property rezoned to allow a gravel mining operation, but the township denied her application. Kyser sued the township, claiming that its refusal to allow gravel mining on her property violated her substantive due process rights, because gravel mining would cause "no very serious consequences" under the rule adopted in *Silva v Ada Township*, 416 Mich 153 (1982). In *Silva*, the Michigan Supreme Court held that "zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences will result from the proposed extraction.' " Based on the *Silva* rule, Kyser argued that the trial court should grant summary disposition in her favor. The township agreed that the "no very serious consequences" rule applied, but argued that summary disposition was inappropriate because there was a factual dispute as to whether the mining operation would undermine the integrity of the township's gravel district zoning. The trial court denied Kyser's motion for summary disposition, but later ruled in her favor when the case came to trial. The court ordered that the township could not enforce its zoning ordinance to prohibit gravel mining on Kyser's property. The Court of Appeals affirmed in a split published opinion. The dissenting judge disagreed with the majority's decision to affirm the trial court's order permitting gravel mining. The township appealed to the Supreme Court. Among other things, the township argues that *Silva*'s "no very serious consequences rule" was superseded by the Legislature's enactment of MCL 125.297a, which states that a zoning ordinance or decision "shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or the surrounding area within the state, unless there is no location within the township where the use may be appropriately located or the use is unlawful." The Supreme Court first entered an order denying leave to appeal, but then vacated that order on its own motion and granted leave to appeal.

HENDEE, et al. v TOWNSHIP OF PUTNAM (case nos. 137446-7)

Attorney for plaintiffs Jeffrey Hendee, Michael Hendee, Louann Demorest Hendee, and Village Point Development, LLC: Roger L. Myers/(517) 540-1700

Attorney for defendant Township of Putnam: Thomas R. Meagher/(517) 371-8161

Attorney for amicus curiae Michigan Townships Association: John K. Lohrstorfer/(269) 382-4500

Attorney for amicus curiae Michigan Municipal League, Michigan Municipal Risk Management Authority, and Michigan Municipal League Liability & Property Pool: Carol A. Rosati/(248) 489-4100

Attorney for amicus curiae Real Property Law Section of the State Bar of Michigan: David E. Pierson/(517) 482-4890

Trial Court: Livingston County Circuit Court

At issue: The plaintiffs, owners of a parcel of vacant land, sued Putnam Township after the township denied their request to rezone the property from agricultural to residential use. The trial court found the current zoning to be unconstitutional "as applied" to the plaintiffs' property, and ruled that the township could not interfere with reasonable use of the parcel as a manufactured housing community. The trial court awarded the plaintiffs costs and expert witness fees, but

denied attorney fees. After the parties appealed, the Court of Appeals reversed as to the constitutional "as applied" claim, but affirmed the trial court's other rulings. Does a rule of finality apply to the plaintiffs' exclusionary zoning claim? If so, did the Court of Appeals properly hold that the finality requirement was excused due to futility? Did the trial court err in ordering the township not to interfere with the plaintiffs' proposed use of their property for a manufactured housing community when the plaintiffs withdrew their application for that use? To support a claim that a zoning ordinance unconstitutionally excludes a lawful use, must the plaintiffs show that there is a need for that use? Did the trial court abuse its discretion by awarding the plaintiffs their costs and expert witness fees?

Background: Jeffrey, Michael and Louann Hendee inherited a 144-acre parcel of vacant land from their mother; the property, located in Putnam Township, was zoned for agricultural use. The Hendees sought to have the land rezoned for residential use and entered into a contingent sale agreement with a development company. The Hendees requested a 95-lot planned unit development. Later, during the rezoning proceedings, the Hendees began contemplating a more intensive 498-unit manufactured housing community, but withdrew an application to rezone the property for that use when told that the township would consider only one rezoning application at a time. The township denied the Hendees' rezoning request, as well as a request for a use variance that would allow the same development. The Hendees sued the township. The trial court found that the agricultural zoning classification was unconstitutional as applied to the property, and that the township's total exclusion of manufactured housing communities amounted to unlawful exclusionary zoning. The plaintiffs had established that a manufactured housing community constituted a reasonable use of the property, the court found. The court entered an injunction preventing the township from enforcing the agricultural zoning classification and from interfering with the plaintiffs' development of a manufactured housing community. The court awarded the plaintiffs taxable costs and expert witness fees, but denied their request for attorney fees pursuant to 42 USC 1983 and 1988. The parties appealed to the Court of Appeals. In a split unpublished opinion, the Court of Appeals reversed in part, finding no merit to the plaintiffs' claims that the zoning classification was unconstitutional as applied to their property. But the Court of Appeals affirmed the trial court's ruling on the exclusionary zoning claim and the injunction, as well as the costs and attorney fee rulings. One judge dissented as to the exclusionary zoning claim, stating that the claim was unripe and that the plaintiffs had not met their burden of establishing demonstrated need for a manufactured housing community as required by MCL 125.297a. The township appeals.

DAWE, et al. v BAR-LEVAV & ASSOCIATES, P.C., et al. (case no. 137092)

Attorneys for plaintiff Elizabeth Dawe: Mark Granzotto/(248) 546-4649, Justin Haas/(248) 799-3100

Attorney for defendants Dr. Reuvan Bar-Levav & Associates, P.C., Estate of Dr. Reuvan Bar-Levav, M.D., and Dr. Leora Bar-Levav, M.D.: Noreen L. Slank/(248) 355-4141

Trial Court: Oakland County Circuit Court

At issue: The plaintiff in this case was in a group therapy session with her psychiatrist when a former patient, who had been a member of the therapy group, came into the office and fatally shot the psychiatrist. The gunman killed another patient, and wounded the plaintiff and another patient, before turning the gun on himself. The plaintiff filed a medical malpractice suit against the psychiatrist's estate, his professional corporation, and another physician in the practice. She claimed in part, citing MCL 330.1946, that the defendants knew or had reason to know that the former patient presented a danger to other members of the therapy group. She also asserted a

common-law medical malpractice claim, asserting that the defendants breached the standard of care by placing a dangerous patient in group therapy and failing to take reasonable steps for the plaintiff's protection. There is no dispute that the gunman never threatened the plaintiff directly. Does the plaintiff have a claim under MCL 330.1946? Does the statute preempt all common law causes of action for failure to warn or protect?

Background: Joseph Brooks was treated by Dr. Reuvan Bar-Levav, a psychiatrist with a practice in Southfield. Elizabeth Dawe attended the same group therapy sessions as Brooks for several months, until Dr. Bar-Levav refused to continue treating Brooks because he had stopped taking his medications. Several months later, Dr. Bar-Levav was leading a group therapy session that included Dawe. Brooks came into the office and fatally shot the psychiatrist. He fired several other shots, wounding Dawe and another patient and killing a third patient. Brooks then killed himself.

Dawe sued Bar-Levav's estate, as well as another physician who practiced with him, and his professional corporation. In her medical malpractice complaint, Dawe alleged that the defendants breached a duty under MCL 330.1946, which places obligations on a mental health professional treating a patient who makes a "threat of physical violence against a reasonably identifiable third person" and "has the apparent intent and ability to carry out that threat in the foreseeable future." MCL 330.1946 also states that a mental-health professional has no duty to "warn" or "protect" a "third person," except as provided in the statute. There is no dispute that Brooks never threatened Dawe directly. Dawe also asserted a common-law medical malpractice claim, alleging that the defendants breached the standard of care by placing Brooks into group therapy, and failing to take reasonable steps for her protection.

The defendants moved for summary disposition, arguing that she could not establish a claim under MCL 330.1946 because there was no evidence that Brooks threatened Dawe directly. The defendants also asserted that Dawe's common-law medical malpractice claim was preempted by the statute. In response, Dawe argued that the defendants owed a special duty to her because she was not just any "third person," but another patient. She contended that the physician-patient relationship created a duty that required the defendants to take reasonable precautions for her protection, and that the defendants breached the standard of care by placing Brooks in group therapy.

The trial court denied the defendants' motion and the case proceeded to trial. After the defendants unsuccessfully moved for a directed verdict, the jury returned a $646,842.87 verdict for Dawe. The trial court also denied the defendants' post-judgment motions. In a split published opinion, the Court of Appeals reversed the trial court, vacated the judgment, and remanded the case for entry of an order granting the defendants' motion for directed verdict. The appellate court concluded that MCL 330.1946 preempted all common law claims for failure to warn or protect, and that Dawe failed to state a claim under the statute. The dissenting judge noted that, in 1995, the Legislature amended MCL 330.1946, changing the word "patient" to "recipient" at one point in the first sentence. A "recipient" is defined in MCL 330.1100c(12) as a person who receives mental health services through a state agency or community mental health facility. In this case, the dissenting judge concluded, there was no evidence that Brooks was a "recipient" during the period in which defendants treated him. "Because Brooks was not a recipient, MCL 330.1946(1) did not modify defendants' common law duty to protect third parties from Brooks. Consequently, MCL 330.1946(1) did not abrogate or modify plaintiff's common law claim." The dissenting judge also concluded that the statute does not affect a mental health professional's duty to refrain from actively placing another person in danger. He would have held that the trial court did not err when it denied the defendants' various motions. Dawe appeals.

Afternoon Session

HOLMAN v RASAK (case no. 137993)
Attorney for plaintiff Andrea L. Holman, Personal Representative of the Estate of Linda Clippert, Deceased: Joseph L. Konheim/(248) 552-8500
Attorney for defendant Mark Rasak, D.O.: Julie McCann O'Connor/(248) 433-2000
Attorney for amicus curiae Michigan Association for Justice: Donald M. Fulkerson/(734) 467-5620
Attorney for amicus curiae Michigan Defense Trial Counsel: Raymond W. Morganti/(248) 357-1400
Attorney for amicus curiae ProAssurance Casualty Company and American Physicians Assurance Corporation: Graham K. Crabtree/(517) 482-5800
Attorney for amicus curiae Michigan Health and Hospital Association: Beth A. Wittmann/(313) 965-7405
Attorney for amicus curiae Michigan State Medical Society: Michael N. Pappas/(313) 961-0200
Trial Court: Oakland County Circuit Court
At issue: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) limits the dissemination of protected health information and preempts state law that is less restrictive. Before HIPAA was enacted, Michigan law held that a claimant in a medical malpractice case waived the physician-patient privilege, and that defense counsel could interview the plaintiff's treating physicians without the plaintiff's attorney being present. HIPAA, however, precludes the disclosure of protected health information in the absence of patient consent, notice to the patient and an opportunity to object, or a court order. In this published opinion, the Court of Appeals held that ex parte interviews are permissible if a protective order is issued. Did the Court of Appeals correctly decide the case?
Background: Andrea L. Holman, as personal representative for the estate of Linda Clippert, sued Dr. Mark Rasak, an interventional cardiologist, for medical malpractice. Clippert, who died after suffering an acute myocardial infarction, had been under Rasak's care. During discovery, Holman refused to allow disclosure of anything other than Clippert's medical records. Just before the close of the discovery period, Rasak filed a motion asking the court to enter a qualified protective order to allow his attorney to conduct an ex parte interview – an interview without the plaintiff's attorney being present – with Dr. Gary Goodman, a surgeon who had performed procedures on Clippert. Holman objected, arguing that under The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR 164.512(e), a qualified protective order could only pertain to documentary evidence because HIPAA requires the return or destruction of all protected health information. The trial court, after a hearing, agreed with Holman and denied the motion. In a published opinion, the Court of Appeals reversed, concluding that HIPAA does allow a court to issue a qualified protective order permitting defense counsel's ex parte interview with a treating physician. "In Michigan, it was well established before the enactment of HIPAA that the filing of a lawsuit for personal injury or malpractice generally waived the statutory physician-patient privilege with respect to any injury, disease, or condition at issue in the lawsuit, MCL 600.2157, and that a defendant was permitted to meet ex parte with the injured party's treating physician as part of discovery," the appellate court noted. But under HIPAA, "filing a lawsuit does not waive the confidentiality of health information, and unless the patient gives written consent or enters into an agreement, see 45 CFR 164.508; 45 CFR 164.510, the patient's physician may only disclose confidential health information under limited conditions," the court said. HIPAA supersedes

Michigan law to the extent that HIPAA's protections and requirements are more stringent, so without "written consent [by the plaintiff] or an agreement for the disclosure of confidential health information … a treating physician may only disclose such information under conditions set out in the HIPAA regulations, one of which provides for qualified protective orders," the Court of Appeals stated. "But we disagree with the circuit court's determination that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA. While 45 CFR 164.512(e)(1)(ii) does not specifically address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure." Holman appeals.

Wednesday, November 4
Morning Session

PEOPLE v REDD (case no. 138161)
Prosecuting attorney: Danielle Walton/(248) 858-0656
Attorney for defendant Anthony Marion Redd: Kevin Laidler/(248) 333-7880
Trial Court: Oakland County Circuit Court
At issue: The defendant was accused of having sexual intercourse with a 14-year-old girl. A jury convicted him of third-degree criminal sexual conduct, but the trial court granted the defendant's motion for a new trial because the prosecutor elicited extensive testimony from a police detective that the defendant failed to respond to certain accusations regarding the assault and abruptly left an interview. The Court of Appeals reversed and reinstated the conviction. Did the trial court abuse its discretion when it granted the defendant a new trial? Did the trial court err in admitting the police detective's testimony? Did the defendant waive any error when his attorney expressed satisfaction with the trial court's instructions to the jury?
Background: The complainant, an eighth grader, reported being sexually assaulted by Anthony Redd, her friend's older brother. After interviewing the girl, a Pontiac police detective sent Redd a letter, generally outlining the complainant's allegations and asking Redd to come to the police department for an interview. Redd did so, but, according to the detective's later testimony at trial, was silent when asked to respond to certain accusations and left the interview abruptly. Redd was charged with one count of third-degree criminal sexual conduct and tried for that crime before a jury, which found Redd guilty as charged. Redd then filed a motion for a new trial. He contended that his Fifth and Fourteenth Amendment rights were violated, and that manifest injustice occurred, when the detective testified about Redd's silence at and departure from the interview, and about Redd's having been in jail in Tennessee. The prosecutor responded that Redd's constitutional rights were not violated. Moreover, the trial court judge had cautioned the jury not to draw any improper inferences from Redd's leaving the interview or choosing not to be interviewed, and Redd's attorney had expressed satisfaction with those jury instructions, the prosecution argued. But the trial court granted Redd's motion for a new trial, explaining "the Court finds that [the detective's] testimony regarding [Redd's] silence and leaving the interview after [being] asked about the accusations should not have been introduced in evidence and was clearly prejudicial to [Redd], constituting irreparable error and grounds to support reversal on this appeal – or this request." In an unpublished opinion, the Court of Appeals reversed the trial court's ruling and reinstated Redd's conviction. The Court of Appeals held that Redd waived any error and, in any case, Redd's silence was not constitutionally protected. The Court of Appeals concluded that the rule set forth in *People v Bigge*, 288 Mich 417 (1939), was not violated because there had been "no oral, written, or nonverbal conduct intended as an assertion that defendant

adopted as his own statement." Redd appeals.

BRIGGS TAX SERVICE, L.L.C. v DETROIT PUBLIC SCHOOLS, et al. (case nos. 138168, 138179, and 138182)
Attorneys for petitioner Briggs Tax Service, L.L.C.: Jack J. Mazzara/(313) 343-5200, Larry W. Bennett/(248) 457-7022
Attorneys for respondents Detroit Public Schools, and Detroit Board of Education: David Olmstead/(517) 484-8000, Jerome R. Watson/(313) 963-6420, Robert F. Rhoades/(313) 223-3046
Attorney for respondent City of Detroit: Joanne D. Stafford/(313) 237-3069
Attorney for respondent Wayne County Treasurer: Richard G. Stanley/(313) 224-6672
Attorney for amicus curiae Building Office Managers Association of Metropolitan Detroit: John D. Pirich/(517) 377-0712
Tribunal: Michigan Tax Tribunal
At issue: This case involves a property tax refund claim. In 2002, 2003 and 2004, the Detroit Public Schools collected school operating property taxes from non-residential property owners at a rate that had not been approved by the voters as required by Proposal A. In 2005, a claimant sought a refund of the excess tax, but the state Tax Tribunal dismissed the claim, saying that it did not have jurisdiction over the case because it was not filed within 30 days of when the tax was levied, as required by the Tax Tribunal Act. The Court of Appeals reversed, ruling that there had been a mutual mistake of fact between the city tax assessor and the taxpayers. Because MCL 211.53a provides a three-year limitations period for claims of mutual mistake of fact, the Court of Appeals concluded that the claim was timely and that the Tax Tribunal had jurisdiction. Did the Court of Appeals clearly err in concluding that there was a mutual mistake of fact between the assessor and the taxpayers?
Background: In 1993, voters in the Detroit Public School District approved a 32.25 mill school operating property tax renewal. This millage granted Detroit Public Schools (DPS) the authority to levy this tax until June 30, 2002. On March 15, 1994, Michigan voters approved Proposal A, a school finance reform proposal. Under Proposal A, local school district voters must approve school operating taxes; Proposal A precludes local school districts from levying more than 18 mills in property taxes. Unexpired millages authorized before January 1, 1994 are deemed to have been validly approved under Proposal A.

On June 30, 2002, voter approval for the DPS millage expired, but DPS continued to levy an 18-mill tax for 2002, 2003 and 2004. When DPS later concluded that Proposal A did not indefinitely authorize the 18-mill tax levy, it published a notice to bondholders acknowledging that the taxes levied for years 2002, 2003 and 2004 were levied without voter authorization and that the revenue from these taxes may have to be refunded.

Briggs Tax Service filed a claim in the Tax Tribunal against DPS, the Detroit Board of Education, the city of Detroit, and the Wayne County Treasurer, seeking a refund for property taxes paid pursuant to the illegal tax levy. Briggs filed its complaint as a class action; more than 100 other cases were filed. After discovery, DPS and the other respondents moved for summary disposition, asking the Tax Tribunal to dismiss Briggs' complaint. The Tax Tribunal did not have jurisdiction over Briggs' claims, the respondents argued, because Briggs had not filed its complaint within 30 days of when the tax was levied, as required by the Tax Tribunal Act (MCL 205.735). Briggs countered that its claim was governed by MCL 211.53a, which provides for a three-year limitation period for claims involving mutual mistake of fact made by the assessing officer and the taxpayer. The Tax Tribunal agreed with the respondents and dismissed Briggs' case. The error regarding the legality of the tax levy was a question of law, not a mistake of fact,

the tribunal ruled; accordingly, the 30-day limit applied to bar Briggs' claims. Briggs appealed; in a published opinion, the Court of Appeals reversed and remanded the case to the Tax Tribunal for further proceedings. The Court of Appeals concluded that the mistake over the collection of the unapproved tax levy was a mutual mistake of fact such that the three-year statute of limitations applied, rather than the 30-day limit; hence, the Tax Tribunal did have jurisdiction over Briggs' case, the appellate court said. Respondents DPS, the Detroit Board of Education, the city of Detroit, and the Wayne County Treasurer appeal.

DECOSTA v GOSSAGE, et al. (case no. 137480)
Attorney for plaintiff Donna B. DeCosta: Thomas H. Blaske/(734) 747-7055
Attorney for defendants David D. Gossage, D.O., and Gossage Eye Center: Robert G. Kamenec/(248) 901-4068
Trial Court: Hillsdale County Circuit Court
At issue: Shortly before the statute of limitations on her medical malpractice claim expired, the plaintiff mailed a notice of intent to the defendant physician's former business address. She had seen the doctor a number of times at his newer business address, where he had practiced for about two years. Someone at the former address forwarded the notice of intent to the doctor. Was the plaintiff's case correctly dismissed? To what location must a notice of intent be sent in order to comply with MCL 600.2912b(2)?
Background: Dr. David Gossage performed cataract surgery on Donna DeCosta's left eye on June 3, 2004. Gossage saw DeCosta at least seven times between June and October 2004 at 50 West Carlton Road in Hillsdale, where his business, the Gossage Eye Center, had been located since February 2004. DeCosta had several problems with her left eye following the cataract surgery. On November 20, 2006, DeCosta filed a medical malpractice complaint against Gossage and Gossage Eye Center. DeCosta maintained, in addition to other allegations, that the cataract surgery was unnecessary. The complaint was filed more than two years after DeCosta's claim accrued on June 3, 2004, the date of the cataract surgery. The limitations period for a medical malpractice claim is two years under MCL 600.5805(6). However, the limitations period can be tolled upon the filing of a notice of intent that complies with MCL 600.2912b. The statute provides in part that "The notice of intent to file a [medical malpractice] claim … shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section."

DeCosta mailed notices of intent to Gossage and Gossage Eye Center on June 1, 2006. However, the notices of intent were mailed to 46 South Howell in Hillsdale, Gossage's former business address. Someone at that address accepted and signed for the notices of intent on June 5, 2006, and apparently forwarded them to Gossage. Gossage acknowledges receipt of the notices of intent on June 6, 2006, three days after the limitations period expired. On June 7, 2006, DeCosta mailed a second set of notices of intent to Gossage and Gossage Eye Center at the 50 West Carlton address. Gossage and the Gossage Eye Center moved for summary disposition, asking the trial court judge to dismiss the case. The defendants argued that DeCosta failed to comply with MCL 600.2912b(2) because she had not mailed the notices of intent to the defendants' last known professional business address, as required by MCL 600.2912b. The trial court granted the motion for summary disposition and dismissed DeCosta's complaint with prejudice.

DeCosta filed a claim of appeal. She argued that summary disposition should not have been granted because she timely mailed the notices of intent and the defendants had actual notice, since the notices of intent were forwarded to them. The Court of Appeals affirmed the trial court's

ruling in a split unpublished per curiam opinion. The majority agreed with the defendants' reasoning. The dissenting judge acknowledged that DeCosta was aware of Gossage's new address, but the judge said she could "perceive no evidence to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address." DeCosta appeals.

PEOPLE v WARREN (case no. 137666)
Prosecuting attorney: Charles F. Justian/(231) 724-6435
Attorney for defendant Earnest Lamont Warren: Desiree M. Ferguson/(313) 256-9833
Trial Court: Muskegon County Circuit Court
At issue: The defendant was convicted of assault with intent to commit great bodily harm less than murder and first-degree criminal sexual conduct, and was sentenced to 20 to 75 and 30 to 75 years in prison, respectively. The minimum sentence guidelines range was calculated for the criminal sexual conduct conviction but not the assault conviction. Among other things, the defendant objected that no guidelines range was calculated for the assault conviction. The Court of Appeals found no error. Is the trial court obligated under the guidelines to score all felonies or only the highest class felony?
Background: The complainant accused Earnest Warren of physically and sexually assaulting her. Following a bench trial, Warren was convicted of first-degree criminal sexual conduct and assault with intent to commit great bodily harm. The criminal sexual conduct conviction carried a maximum penalty of life or any term of years; because Warren was a fourth-habitual offender, the same was true for the assault conviction. At sentencing, a trial judge is to consider the pre-sentence investigation report and the minimum sentencing guidelines range, and impose a sentence that includes both a minimum term and the statutory maximum term. MCL 771.14 only requires the presentence investigation report to include guidelines scoring for the highest crime class. But MCL 777.21, which governs the calculation of the minimum sentencing guidelines, states that, if the defendant was "convicted of multiple offenses," subject to an exception that does not apply here, the trial court shall "score each offense as provided in this part." In this case, at sentencing, neither Warren nor defense counsel objected to the pre-sentence investigation report or the calculated minimum sentence guidelines range. The guidelines range was calculated only with respect to the highest class felony, the criminal sexual conduct conviction, and was determined to be 225 to 750 months (18.75 to 62.5 years). Warren was sentenced as a fourth habitual offender to 20 to 75 years for the assault conviction and to 30 to 75 years for the criminal sexual conduct conviction. Warren appealed by right to the Court of Appeals objecting, among other things, that no guidelines range was calculated for the assault conviction. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion. Warren appeals.

Afternoon Session

PEOPLE v TENNYSON (case no. 137755)
Prosecuting attorney: Valerie M. Steer/(313) 224-0205
Attorney for defendant George Walter Tennyson: Julie E. Gilfix/(248) 355-4060
Trial Court: Wayne County Circuit Court
At issue: The defendant was caught in a police raid, in his bedroom with a plate of narcotics hidden under his bed and two firearms in a dresser drawer among residency documents linking him to the home. At the time of the raid, his wife was on the front porch and his 10-year-old son was on the living room couch. There was no evidence of the child's involvement in any crime. The defendant was convicted of doing an act that tended to cause a child to become neglected or

delinquent so as to tend to come under the jurisdiction of the juvenile division of the probate court, MCL 750.145. Is evidence that a child was present in the home when the defendant was in possession of concealed drugs and weapons legally sufficient to support the defendant's conviction?

Background: On August 16, 2006, Detroit police executed a search warrant at George Tennyson's home. They found Tennyson sitting on a bed in one of the home's two bedrooms. When one officer lifted up the bed and looked underneath, he found a baggie of what he believed to be heroin on a plate with a razor blade and a coffee spoon. The officer would later testify that he believed the substance to be heroin, based on his experience and training with narcotics. Another officer testified similarly, estimating that the amount recovered was just over three grams, with a street value of about $700. A third officer performed a field test, which was positive for the presence of heroin. Police also found two loaded blue steel revolvers in the dresser drawer, along with a digital scale and bills sent to that address in Tennyson's name. That bedroom contained both men's and women's clothing. The police found children's clothing in the other bedroom. At the time of the raid, there was a woman on the front porch and a 10-year-old boy on the couch in the living room, who appeared scared and upset. The woman was Tennyson's wife, Felisa Nevins, who was also ticketed for operating a place of illegal occupation; the boy was Tennyson's son.

Tennyson was charged with possession of less than 25 grams of heroin, being a felon in possession of a firearm, felony firearm, and contributing to the delinquency of a minor. He was convicted as charged by a jury. The trial court sentenced Tennyson to one to five years in prison for felon in possession, consecutive to the mandatory two-year prison term for felony firearm. The court also imposed a term of five years' probation for the drug possession and a suspended sentence of 45 days in jail for the misdemeanor of contributing to the neglect or delinquency of a minor. The court also told Tennyson that it would contact the Department of Human Services to begin proceedings to terminate Tennyson's parental rights.

Tennyson appealed on various issues, including his conviction for contributing to the neglect or delinquency of a minor. Tennyson argued that there was no evidence that his son was abused, mistreated, or suffering in any way. But in an unpublished per curiam opinion, the Court of Appeals said that the prosecution was not "required to establish such factors. The intent of the [neglect or delinquency] statute [MCL 750.145] is to prevent individuals from acting in a manner that contributes to the delinquency of minors …. Here, defendant's actions, at the very least, placed his son directly in a home where illegal activity was occurring." Accordingly, "there was sufficient evidence for the jury to infer that defendant's illegal activities could have subjected his son to the jurisdiction of the courts," the appellate court said. The Court of Appeals affirmed Tennyson's convictions. Tennyson appeals.

PEOPLE v HOCH (case no. 137908)

Prosecuting attorney: Richard J. Goodman/(586) 469-5350

Attorney for defendant Steven James Hoch: Neil J. Leithauser/(248) 687-1404

Trial Court: Macomb County Circuit Court

At issue: The defendant was convicted of unarmed robbery, fleeing and eluding, larceny from a motor vehicle, and driving with a suspended license. During its deliberations, the jury sent a note asking to be instructed concerning an "inadvertent assault." The judge, who was not the judge who tried the case, proceeded without calling the defendant into the courtroom or making a record. The judge later reported that he told the jurors to rely on the instructions they had already been given, and to work through those instructions to come to their own conclusions. The Court of Appeals reversed the defendant's convictions, finding structural error because the question involved a

substantive issue concerning the law that the jury was to apply. A dissenting judge would have found that the communication was administrative because the judge merely told the jurors to use the instructions they had already been given. Did the Court of Appeals properly decide the case?

Background: Steven Hoch stole LeAnn Goforth's purse out of her SUV while she was at a gas station. Hoch fled from the gas station in his truck, but Goforth pursued him. When Hoch stopped for a red light, Goforth maneuvered her vehicle in front of his, got out, ran to Hoch's truck, and pulled his door open. She demanded that Hoch return her purse. Hoch denied having it. During this exchange, Hoch's truck moved forward, and the door clipped Goforth's shoulder. Hoch drove away, and Goforth called 911 and continued to follow him. Eventually police officers took up the chase, and stopped Hoch. He was arrested and charged with unarmed robbery, larceny from the person, fleeing and eluding, larceny of under $200 from a motor vehicle, and driving while license suspended, second offense. At trial, Hoch admitted that he stole Goforth's purse, but argued that he did not assault her during the theft. He claimed that any injury that she received while at his truck was accidental. The judge assigned to the case was on vacation when the case was scheduled to begin. A visiting judge took the proofs and instructed the jury. He told the jury that an assault was required in order to prove the crime of unarmed robbery, and that an assault cannot happen by accident. He said that a copy of the instructions would be provided to the jury. The attorneys said that they were satisfied with the instructions. The case went to the jury in the late afternoon on a Friday. The jury deliberated for about an hour and a half before being dismissed for the weekend. The next Monday, the sitting judge returned as the jury continued its deliberations. Late in the afternoon it returned a verdict of guilty on all counts: unarmed robbery, fleeing and eluding, larceny of under $200 from a motor vehicle, and driving while license suspended, second offense. At sentencing, Hoch asked the court about a note that the jury sent during its deliberations, asking for further instructions on an "inadvertent assault." Hoch said that he was kept in the holding cell and not taken into the courtroom. He heard that the court declined to give further instruction, and wanted to know what happened. The judge replied that, to the best of his recollection, the jurors were told to refer to their notes, to the instructions that had been provided, and to the testimony. He told them to use their judgment to work through the evidence. The judge said that he did not keep notes of this and it does not appear to have been transcribed. The judge then imposed sentence. Hoch appealed to the Court of Appeals, raising several issues. In a split unpublished opinion, the Court of Appeals reversed his convictions. It found that the trial court reversibly erred by failing to have Hoch and his counsel present when reinstructing the jury. One judge dissented on grounds that the trial judge did not really "reinstruct" the jury because he gave it no further instructions than what it had already been told. The prosecutor appeals.

LOOS v J.B. INSTALLED SALES, INC., et al. (case no. 137987)
Attorney for plaintiff James A. Loos, Jr.: Daryl C. Royal/(313) 730-0055
Attorney for defendants J.B. Installed Sales, Inc., a/k/a J.B. Supply and Accident Fund Insurance Company of America: Gerald M. Marcinkoski/(248) 433-1414
Tribunal: Workers Compensation Appellate Commission
At issue: The plaintiff's income tax records show that he was paid by Robinson Roofing as a non-employee. Relying on these records, the worker's compensation magistrate concluded that the plaintiff was not an employee under the Worker's Disability Compensation Act, and denied the plaintiff's request for benefits. The Workers' Compensation Appellate Commission reversed, and the Court of Appeals affirmed the WCAC's ruling, holding that the magistrate erred in focusing on the plaintiff's income tax records when deciding the question of whether plaintiff was an employee. Did the Court of Appeals properly decide the case?

Background: James Loos sought worker's compensation benefits for injuries he sustained in 2003 when he fell off a roof where he was working. At the time, Loos alleged, he was employed by Robinson Roofing, an independent contractor which had contracted with J.B. Installed Sales, Inc., to perform the roof work. William Robinson, owner of Robinson Roofing, had signed an independent contractor agreement with J.B. Installed Sales in which he stated that he did not have any employees. If he did hire employees, the agreement stated, Robinson would notify J.B. Installed Sales and present an insurance certificate showing that any employees were properly covered by a worker's compensation insurance policy before putting the crew on the job. Robinson never advised J.B. Installed Sales that Robinson Roofing had any employees and never provided any proof of insurance. Robinson paid Loos for his work at J.B. Installed Sales' projects by the job, in cash and with no taxes or deductions taken out. Robinson reported Loos' earnings to the IRS on Form 1099 as non-employee compensation.

Loos claimed that he was entitled to worker's compensation benefits from J.B. Installed Sales under the Worker's Disability Compensation Act. MCL 418.171 permits an employee of an uninsured employer to claim benefits directly from the person or entity for whom the uninsured employer was performing services at the time of the employee's injury. MCL 418.161(1)(n) defines "employee" in part as "[e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." Loos testified that he did not hold himself out to the public to do roofing business, did not maintain a separate business and did not have any employees, although he admitted that he considered himself "somewhat" self-employed. The defendants introduced William Robinson's signed statement that he did not have any employees, together with Loos' 2003 income tax records showing that Loos received IRS non-employee compensation forms 1099 from Robinson Roofing and another roofing company, but received W-2 employee compensation forms from the other two roofers for whom he worked in 2003. In addition, the defendants provided Loos' Social Security records, which did not reflect any earnings at Robinson Roofing, and hospital records indicating that Loos was self-employed. The worker's compensation magistrate denied benefits, finding that Loos was not a direct employee of J.B. Installed Sales or of Robinson Roofing. The magistrate considered the IRS records to be the most persuasive evidence, and also cited the Social Security and hospital records. Loos appealed to the Workers' Compensation Appellate Commission, which reversed. The WCAC stated that, on the issue of whether Loos was Robinson's employee, the only competent evidence was Loos' testimony denying that he was an employer, had any employees, or maintained a separate business. The WCAC acknowledged the evidence that the magistrate had relied on, which it stated was "not irrelevant," but concluded that the record supported only one conclusion, that Loos was an employee of Robinson Roofing. The Court of Appeals affirmed the WCAC in an unpublished per curiam opinion. The court held that the magistrate's reliance on Loos' tax forms was improper, and that the WCAC properly concluded that the magistrate's analysis was legally flawed. The defendants appeal.

Thursday, November 5
Morning Session Only

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE (case no. 137451)
Attorney for plaintiff Michigan Education Association: Kathleen Corkin Boyle/(517) 349-7744
Attorney for defendant Secretary of State: Heather S. Meingast/(517) 373-4875

Attorney for amicus curiae Michigan Chamber of Commerce: Eric E. Doster/(517) 371-8241
Attorney for amicus curiae Mackinac Center for Public Policy: Patrick J. Wright/(989) 631-0900
Attorney for amicus curiae Michigan State AFL-CIO, et al.: Andrew Nickelhoff/(313) 496-9429
Attorney for amicus curiae Michigan State Employees Association: Michael E. Cavanaugh/(517) 482-5800
Trial Court: Ingham County Circuit Court
At issue: Under collective bargaining agreements with the Michigan Education Association, various public school districts administer a payroll deduction plan for the MEA's political action committee. The Secretary of State concluded that the school districts' administration of the payroll deduction plan amounted to a "contribution" or expenditure" of public funds, in violation of the Michigan Campaign Finance Act. Does section 57(1) of the act, MCL 169.257(1), prohibit a school district from expending government resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA? Does a school district have the authority to collect and deliver payroll deductions for such contributions?
Background: The Michigan Education Association is a voluntary labor organization that represents members employed by public schools, colleges, and universities; its political action committee is funded in part by MEA member payroll deductions. The MEA has collective bargaining agreements with various public school districts throughout Michigan; these agreements include a requirement that the school district employer administer a payroll deduction plan for contributions to the MEA's PAC. In 2006, the MEA asked the Secretary of State to issue a declaratory ruling that the school districts' administration of the payroll deduction program was not an "expenditure" under the Michigan Campaign Finance Act, and so did not violate the act. In a letter, the Secretary of State responded that the school districts could not continue to make and transmit the payroll deductions. She noted that Section 57(1) of the Campaign Finance Act prohibits the use of public funds to make "contributions" or "expenditures." Without an express statutory provision permitting public bodies to administer such payroll deduction plans, the Secretary of State wrote, she was "constrained to conclude that the school district is prohibited from expending government resources for a payroll deduction plan that deducts wages from its employees on behalf of the MEA-PAC." The Secretary of State also concluded that a violation of Section 57 could not be avoided by requiring the union to pay the anticipated costs of the payroll deduction system, because the act provided no such exception.

The MEA filed a petition in the circuit court for review of the Secretary of State's decision. The circuit court concluded that the Secretary of State's ruling was arbitrary, capricious, and an abuse of discretion. The circuit judge agreed that, under Section 57, the administration of payroll deductions to a union PAC constitutes an "expenditure" under the Campaign Finance Act. But he concluded that, where the costs of administering such a system are reimbursed, "no transfer of value to the union PAC occurs, and therefore, an 'expenditure' has not been made" within the meaning of the act. In a split published opinion, the Court of Appeals reversed. The majority held that Section 57(1) prohibits a public body, such as a school district, from using public resources "to make a contribution or expenditure . . . ." MCL 169.257(1). The cost associated with a payroll deduction system for a PAC is an "expenditure," the appellate court majority said. Advance reimbursement of the costs of the payroll deduction system does not alter that conclusion or prevent an expenditure from occurring, the majority said. The dissenting judge would have affirmed the circuit court's ruling, but for a different reason – namely, that the administrative costs of such a payroll deduction system do not constitute an "expenditure" at all, as the Campaign

Finance Act defines that term. He would have asked the parties to address additional issues. The MEA appeals.

BONKOWSKI v ALLSTATE INSURANCE COMPANY (case no. 137672)
Attorney for plaintiff Shaun Bonkowski: Larry A. Smith/(248) 358-3920
Attorney for defendant Allstate Insurance Company: Daniel S. Saylor/(313) 446-5520
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Richard E. Hillary, II/(616) 831-1700
Trial Court: Oakland County Circuit Court
At issue: In this first-party no-fault insurance case, a jury awarded the plaintiff more than $1.3 million in attendant care benefits, as well as no-fault penalty interest. Did the Court of Appeals err in holding that 12 percent no-fault penalty interest under MCL 500.3142 does not continue to accrue through the satisfaction of judgment, but ceases to accrue once a judgment is entered?
Background: This is a first-party no-fault auto insurance case arising out of a claim for underpaid attendant care benefits. In 2001, Shaun Bonkowski was hit by a car; he sustained a traumatic brain injury and a spinal cord injury that rendered him a quadriplegic. Ever since the accident, Bonkowski has required round-the-clock care, which Bonkowski's father, Andrew, has provided. Allstate Insurance Company was Bonkowski's no-fault insurer. Upon Bonkowski's release from the hospital, Allstate paid attendant care benefits to Andrew Bonkowski at a rate of $19.00 per hour. But Bonkowski asked Allstate to pay his father at a higher rate, contending that Andrew Bonkowski had been trained to provide skilled, multidisciplinary, in-home care that normally would be provided by multiple healthcare workers. Allstate declined to pay a higher rate and Bonkowski sued. Following a trial, a jury awarded Bonkowski $1,381,114.00 in additional attendant care benefits. The jury also awarded Bonkowski $349,609.67 in no-fault penalty interest under MCL 500.3142, which states that an "overdue payment bears simple interest at the rate of 12% per annum." With the addition of costs, attorney fees, and judgment interest, the judgment totaled $2,541,146.87. Bonkowski maintained that interest should continue to accrue until Allstate satisfied the judgment, but the trial court refused to impose the 12 percent penalty past the date of the entry of judgment. Both parties appealed, seeking review of various components of the trial court's rulings. In a published opinion, the Court of Appeals affirmed the jury verdict and the trial court's denial of 12 percent penalty interest through the satisfaction of judgment. The appeals court also reversed the award of attorney fees to Bonkowski and remanded the case to the trial court for further proceedings concerning the calculation of attorney fees. Bonkowski appeals.

PEOPLE v PLUNKETT (case no. 138123)
Prosecuting attorney: David A. King/(734) 222-6620
Attorney for defendant Ronald James Plunkett: Kevin S. Gentry/(734) 449-9999
Trial Court: Washtenaw County Circuit Court
At issue: The defendant supplied the transportation and money for his girlfriend's purchase of heroin and crack cocaine. She gave some heroin to the 22-year-old victim, who died of an overdose. A Washtenaw district court bound the defendant over to circuit court on charges that included delivery of heroin causing death, MCL 750.317a, and delivery of less than 50 grams of heroin. The circuit court granted the defendant's motion to quash both charges due to lack of "delivery." In a split, published decision, the Court of Appeals affirmed. Do the defendant's actions in this case fall within the scope of MCL 750.317a?
Background: Ronald Plunkett and Tracy Ann Corson lived together. According to Corson's later testimony, the two used drugs frequently. Corson used crack cocaine and heroin, while Plunkett

typically used crack. On June 15, 2006, after Plunkett got off work, he and Corson drove to Detroit and bought heroin and crack cocaine with Plunkett's money. They smoked crack, and Corson injected heroin on the drive back to Plunkett's apartment. That evening, Corson received a phone call from a friend, Tiffany Gregory, asking if she had any drugs. Corson told Gregory to come over to Plunkett's apartment, which she did, at about 3:00 a.m. Gregory was intoxicated when she arrived; she smoked crack with Corson, Plunkett, and another person in the living room. Then Gregory and Corson went into another room where both injected heroin. Corson went into the bathroom and, when she returned, Gregory was unconscious. She died of a drug overdose. Corson and Plunkett were arrested several months later.

At Plunkett's preliminary examination, defense counsel argued that Plunkett had never possessed – constructively or otherwise – the heroin that caused Gregory's death, and that he did not deliver it to Gregory. He argued that there was no logical nexus between the delivery and Gregory's death. But the prosecutor countered that MCL 750.317a was intended to cover this exact situation. That statute states that a person who delivers a controlled substance, other than marijuana, "to another person . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony . . . ." The judge agreed with the prosecutor, and bound over Plunkett on four counts: delivery of heroin causing death, under MCL 750.317a; delivery of heroin less than 50 grams; delivery of cocaine; and maintaining a drug house. Plunkett moved to quash the bindover, and the circuit judge granted the motion as to the first two charges of delivery of heroin causing death and delivery of heroin less than 50 grams. The judge found that Plunkett had not given Gregory heroin and did not know that Corson intended to give Gregory heroin. As to whether Plunkett delivered heroin to Corson, the court concluded that Plunkett and Corson went together to the dealer and, at most, jointly procured the drugs for their own use. Finding no delivery by Plunkett, the circuit court concluded that the district court had abused its discretion when it bound Plunkett over on the first two charges. The circuit judge found sufficient evidence to support the charges for delivery of cocaine and maintaining a drug house. In a split published opinion, the Court of Appeals affirmed the circuit court's ruling. The dissenting judge would have held that Plunkett aided and abetted the delivery of heroin to Corson. The prosecutor appeals.

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